UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL O'CONNOR, VIRL ANDRICK, DONNA VILLELLA, and STEPHAN LUKER, on behalf of themselves and others similarly situated,

Plaintiffs,

- against -

THE INSTITUTE OF CULINARY EDUCATION, INC. and RICHARD SMILOW,

Defendants.

No. 1:10-cv-07239 (DAB)

DEFENDANTS' FIRST AMENDED ANSWER AND AFFIRMATIVE DEFENSES

Defendants The Institute of Culinary Education, Inc. ("ICE") and Richard Smilow ("Smilow", collectively with ICE, the "Defendants"), by and through their attorneys, Fox Rothschild, LLP, hereby answer the Complaint (hereinafter the "Complaint"), of Plaintiffs Michael O'Connor, Virl Andrick, Donna Villella, and Stephan Luker (collectively, the "Plaintiffs"), individually and on behalf of others similarly situated:

1. Paragraph 1 of the Complaint does not assert any factual allegations and, thus, no response is required.

JURISDICTION AND VENUE

2. Paragraph 2 of the Complaint states legal conclusions to which no response is required. To the extent that any further response is required, Defendants deny the allegations.

3. Paragraph 3 of the Complaint states legal conclusions to which no response is required. To the extent that any further response is required, Defendants deny the allegations.

THE PARTIES

4. Paragraph 1 of the Complaint does not assert any factual allegations and, thus, no response is required.

5. Defendants admit the allegations set forth in Paragraph 5 of the Complaint.

6. Defendants admit the allegations set forth in Paragraph 6 of the Complaint.

7. Defendants deny the allegations set forth in Paragraph 7 of the Complaint, except to admit that Smilow is an owner of ICE.

8. Defendants deny the allegations set forth in Paragraph 8 of the Complaint, except to admit that Plaintiffs are all current ICE employees.

FLSA COLLECTIVE ACTION ALLEGATIONS

9. Defendants deny the allegations set forth in Paragraph 9, except to admit that Plaintiffs purport to bring a collective action under the Fair Labor Standards Act ("FLSA").

10. Defendants deny the allegations set forth in Paragraph 10 of the Complaint.

11. Defendants deny the allegations set forth in Paragraph 11, except to admit that Plaintiffs purport to bring a collective action under the Fair Labor Standards Act ("FLSA").

RULE 23 CLASS ALLEGATIONS – NEW YORK

12. Defendants deny the allegations set forth in Paragraph 12, except to admit that Plaintiffs purport to bring a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP").

13. Defendants deny the allegations set forth in Paragraph 13.

14. Defendants deny the allegations set forth in Paragraph 14.

15. Defendants deny the allegations set forth in Paragraph 15.

16. Defendants deny the allegations set forth in Paragraph 16.

17. Defendants deny the allegations set forth in Paragraph 17.

18. Defendants deny the allegations set forth in Paragraph 18, except to state that they have no knowledge regarding the policies and practices of other employers within New York.

19. Defendants deny the allegations set forth in Paragraph 19.

FACTS

20. Defendants deny the allegations set forth in Paragraph 20.

21. Defendants deny the allegations set forth in Paragraph 21.

22. Defendants deny the allegations set forth in Paragraph 22.

23. Defendants deny the allegations set forth in Paragraph 23.

24. Defendants deny the allegations set forth in Paragraph 24, except to admit that ICE distributed a portion of its service charge to its servers and chef assistants.

25. Defendants deny the allegations set forth in Paragraph 25.

26. Defendants deny the allegations set forth in Paragraph 26, except to admit that ICE's servers and chef assistants were paid an hourly rate plus a portion of the service charge collected for each event they worked.

27. Defendants deny the allegations set forth in Paragraph 27.

28. Defendants deny the allegations set forth in Paragraph 28.

FIRST CLAIM OF RELIEF

29. In response to Paragraph 29, Defendants restate their responses to Paragraphs 1-28 as set forth above.

30. Defendants deny the allegations set forth in Paragraph 30.

31. Defendants deny the allegations set forth in Paragraph 31.

32. Defendants deny the allegations set forth in Paragraph 32.

33. Defendants deny the allegations set forth in Paragraph 33, except to admit that Plaintiffs are purporting to seek various remedies under the FLSA.

SECOND CLAIM OF RELIEF

34. In response to Paragraph 34, Defendants restate their responses to Paragraphs 1-33 as set forth above.

35. Defendants deny the allegations set forth in Paragraph 35.

36. Defendants deny the allegations set forth in Paragraph 36.

37. Defendants deny the allegations set forth in Paragraph 37.

38. In response to the Paragraphs under "Prayer for Relief," Defendants deny that Plaintiffs are entitled to the relief requested, or any relief at all.

DEFENDANTS' AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint, and each claim purported to be alleged therein, fails to allege facts sufficient to state a claim upon which relief can be granted. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

SECOND AFFIRMATIVE DEFENSE

The Complaint, and each claim purported to be alleged therein, is barred in whole or in part by the doctrine of waiver. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

THIRD AFFIRMATIVE DEFENSE

The Complaint, and each claim purported to be alleged therein, is barred to the extent that Plaintiffs have or had unclean hands. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

FOURTH AFFIRMATIVE DEFENSE

The Complaint, and each claim purported to be alleged therein, is barred in whole or in part by judicial, equitable, and/or collateral estoppel. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

FIFTH AFFIRMATIVE DEFENSE

The Complaint, and each claim purported to be alleged therein, is barred in whole or in part by the doctrine of laches. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

SIXTH AFFIRMATIVE DEFENSE

To the extent Plaintiffs and putative collective action members have received other benefits and/or awards attributable to an injury for which they seek compensation in this case, such benefits and/or awards should offset, in whole or in part, any award they receive here for the same injury. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

SEVENTH AFFIRMATIVE DEFENSE

Defendants have at all times acted in good faith and have had reasonable grounds for believing that its pay practices complied with federal and state law. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

EIGHTH AFFIRMATIVE DEFENSE

The putative collective action members cannot proceed collectively under 29 U.S.C. §216(b) because they are not similarly situated. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TENTH AFFIRMATIVE DEFENSE

The Court should not exercise supplemental jurisdiction over the counts in the Complaint that purport to arise under New York Labor Law. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

ELEVENTH AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which prejudgment interest may be granted. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims for liquidated damages are barred, in whole or in part, because any and all actions taken by Defendant were undertaken in good faith and with reasonable grounds for believing such actions were not in violation of federal or New York law. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs cannot establish or satisfy the requirements for a collective action pursuant to Section 216(b) of the FLSA and, therefore, the collective action allegations of the Complaint should be stricken and dismissed. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

FOURTEENTH AFFIRMATIVE DEFENSE

At no time material hereto did any of the Defendants act in a willful, wanton, reckless, and/or malicious manner or with reckless disregard of either the FLSA or New York law. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

FIFTEENTH AFFIRMATIVE DEFENSE

There is no basis for awarding damages under the facts and circumstances of this case. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

SIXTEENTH AFFIRMATIVE DEFENSE

Defendants are not liable for damages, including liquidated damages. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs suffered no injuries as a result of any alleged acts or omissions by Defendants. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' alleged injuries, sufferings and damages, if any, were caused by Plaintiffs' own acts, omissions or conduct. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

NINETEENTH AFFIRMATIVE DEFENSE

To the extent that the period of time alluded to in the Complaint, or the period of time alleged later in this action, predates the limitations period set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), such claims of Plaintiffs are barred. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by the provisions of Section 10 of the Portal-to-Portal Act, 27 U.S.C. § 259, because actions taken in connection with Plaintiffs' compensation were done in good faith in conformity with and reliance upon written administrative regulations, orders, rulings, approvals, interpretations, and written and unwritten administrative practices or enforcement policies of the Administrator of the Wage and Hour Division of the United States Department of Labor. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by the provisions of Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions giving rise to this action were done in good faith and with reasonable grounds for believing that the actions or omissions were not a violation of the FLSA. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part to the extent that the work they performed falls within exemptions, exclusions, exceptions, or credits provided for in Section 7 of the FLSA, 29 U.S.C. § 207 and New York Labor Law. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part to the extent that the work they performed falls within exemptions provided for in Section 13(a) and/or (b) of the FLSA, 29 U.S.C. § 213(a) and/or (b) and New York Labor Law. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Defendants hereby invoke the doctrine of waiver to bar the claims asserted by Plaintiffs to the extent the Department of Labor has already investigated and issued a determination or otherwise resolved any prior claims. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by the doctrine of *de minimis non curat lex*. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

To the extent that discovery reveals that Plaintiffs falsely reported their hours and there is no evidence that Defendants required the false reporting of hours; no evidence that Defendants encouraged Plaintiffs to falsely report their hours; and no evidence that Defendants knew or should have known that Plaintiffs were providing false information as to their hours, Defendants hereby invoke the doctrine of estoppel to bar the claims asserted by Plaintiff. See Brumbelow v. Quality Mills, Inc., 462 F.2d 1324, 1327 (5th Cir. 1972). This defense may also apply to the claims of some or all of the class of allegedly similarly situated person.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Defendant Smilow is not an "employer" as that term is defined under the FLSA or New York Labor Law.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs did not work more than 40 hours in any given workweek. This defense may also apply to the claims of some or all of the class of allegedly similarly situated persons.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part because Plaintiffs were not "employees" of Defendants as that term is defined under the FLSA and New York Labor Law.

Defendants reserve the right to amend or add additional affirmative defenses or counter-claims, which may become known during the course of this action.

WHEREFORE, Defendants pray for judgment as follows:

A. That Plaintiffs and the putative class and collective action members take nothing by the Complaint;

B. That the Complaint be dismissed with prejudice, together with the costs and disbursements of this action; and

C. For such other relief as this Court may deem just and proper.

Dated: New York, New York
November 15, 2010

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CERTIFICATE OF SERVICE

I, Seth M. Kaplan, an attorney admitted to practice in this Court, hereby certify that on November 15, 2010, I caused a true and correct copy of the foregoing Defendants' Answer and Affirmative Defenses to be filed with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

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